



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

March 3, 2003

Mr. Brad Norton
Assistant City Attorney
City of Austin - Law Department
Post Office Box 1546
Austin, Texas 78767-1546

OR2003-1302

Dear Mr. Norton:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 177253.

The City of Austin (the "city") received two requests for information related to audits, service contracts, and compliance records of contractors involving the city's Department of Small and Minority Business Resources. You indicate that the city has no information that is responsive to the portion of the request pertaining to citations or fines levied by the city, or legal action taken by the city, in connection with violations of certain city regulations.¹ You claim that the submitted information is excepted from disclosure under section 552.108 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

As an initial matter, subsections 552.301(a) and (b) of the Public Information Act (the "Act") provide:

¹The Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received, nor does it require a governmental body to prepare new information in response to a request. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); see also Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [act's] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

(b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th business day after the date of receiving the written request.

Further, section 552.301(e) provides that a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. As you acknowledge, the city did not request a decision within the ten business day period mandated by section 552.301(a), and did not provide this office with the above-listed information within the fifteen business day period mandated by section 552.301(e).

Because the city failed to comply with the time periods prescribed by section 552.301, the requested information is presumed to be public. *See* Gov't Code § 552.302. This presumption of openness can only be overcome by a compelling demonstration that the information should not be made public. This office has long held that a compelling reason to withhold information exists, sufficient to overcome the section 552.302 presumption of openness, where the information at issue is made confidential by another source of law or affects third party interests. *See* Open Records Decision Nos. 26 (1974), 150 (1977). You argue that the submitted information is excepted under section 552.108 of the Government Code. Section 552.108 may provide a compelling reason to overcome the presumption of openness. *See* Open Records Decision No. 586 (1991) (need of another governmental body to withhold requested information may provide compelling reason for nondisclosure under section 552.108). Therefore, we will address the applicability of section 552.108 of the Government Code.

We note, however, that some of the information falls within the purview of section 552.022(a)(3). Section 552.022(a)(3) provides that information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body is not excepted from required disclosure unless the information is expressly confidential under other law. The submitted information includes service contracts between the city and outside providers. The service contracts are contracts as contemplated

by section 552.022(a)(3), and are therefore public information not excepted from public disclosure, unless the information is expressly made confidential under other law.

You contend that the information subject to the purview of section 552.022 is excepted from disclosure under section 552.108 of the Government Code. Section 552.108 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.,* Open Records Decision Nos. 177 (1977) (law enforcement exception may be waived), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential. Thus, the information subject to section 552.022 may not be withheld from disclosure under section 552.108. As you raise no other exception to disclosure for this information, the contracts must be released to the requestor.

We next address your section 552.108 claim for the remaining submitted information. Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

In Open Records Decision No. 586 (1991), we concluded that the need of a governmental body to withhold information from disclosure, other than the one that has failed to timely comply with the requirements for requesting an attorney general decision under the Act, may provide a compelling reason that overcomes the presumption that the information is public. You have submitted a letter from the Travis County District Attorney's Office (the "district attorney"), stating that the district attorney is currently conducting a criminal investigation and asking that none of the requested information be released during the pendency of the investigation. Although the city did not claim an exception to disclosure under section 552.108 for the requested information within the ten-business-day time period prescribed by section 552.301 of the Government Code, we conclude that the need of the district attorney to withhold the requested information under section 552.108 provides a compelling reason for nondisclosure of the information. Open Records Decision No. 586 (1991).

Based upon the representations provided by the district attorney, we conclude that the release of the submitted information would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ.

App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Thus, the city may withhold the remaining submitted information under section 552.108 on behalf of the district attorney.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877)673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512)475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Cindy Nettles", written over a horizontal line.

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 177253

Enc. Submitted documents

c: Mr. Stephen Scheibal
Austin American-Statesman
P.O. Box 670
Austin, Texas 78767
(w/o enclosures)